No. 22,286

IN THE

United States Court of Appeals

For the Ninth Circuit

TRANSAMERICA EQUIPMENT LEASING CORPORATION, a Texas corporation,
Appellant,

vs.

UNION BANK, a California corporation,
Appellee.

Appeal from a Judgment of the United States District Court for the Central District of California
Honorable Manuel L. Real, Judge

APPELLANT'S REPLY BRIEF

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1. THE ORAL AGREEMENT IS NOT BARRED BY THE STATUTE OF FRAUDS.

A. The Defense of the Statute of Frauds Was Not Claimed When It Could Have Been Claimed. This Is a Waiver.

The Trial Court held that any oral agreement was barred by the Statute of Frauds. But this was not a contention which defendant made at the trial. In its opening brief, plaintiff pointed out that the Trial Court had no authority to donate an optional remedial defense to a defendant who had not claimed it. De-

fendant, in its brief, does not deny that the defense was not claimed. It argues, however, that it did not have "any opportunity" to make the claim because "plaintiff's reliance upon an oral contract was in the nature of an afterthought, after evidence properly admitted was in and the opportunity to move to strike such evidence had passed." (Brief, p. 28.)

Defendant does not explain how it was possible for the Judge to seize on the point during the trial (Tr. 402, 431, 449) even before defendant put on its case, if the issue was raised too late for the defendant to have any opportunity to voice its objection.

Defendant offered five reasons to support its claim that plaintiff's reliance on the oral agreement was "an afterthought". None of the reasons is valid.

(a) Complaint.

Defendant says the complaint was based on the written loan agreement. (Brief, p. 28.) Paragraph III of the complaint expressly refers to the oral commitment. (R. 3.)

(b) Pretrial Order.

Defendant states that "at the pretrial, for the first time, plaintiff contended that there was an oral agreement *and a written memorandum thereof sufficient to obviate any objection based upon the statute of frauds* [Pretrial Order, Par. VIA, pp. 3-4, R. 217-218]. . . . At this juncture, plaintiff made no contention that it relied upon an oral agreement, independent of the 'loan agreement'." (Brief, pp. 28-29, emphasis in original.)

Defendant's summary of the pretrial order is not true.

The portion of the pretrial order cited by defendant said that the plaintiff contended an issue to be tried was whether there was an oral contract. There was *no* reference in that portion of the pretrial order to any written memorandum "sufficient to obviate any objection based on the statute of frauds." The only reference to a writing was to whether all of the terms of the oral contract were incorporated in and integrated in a writing so as to forbid extrinsic evidence under the parol evidence rule. This is clearly stated in the pretrial order at paragraph VII(I). (R. 322.)

> "Plaintiff contends that the following issue of law is to be litigated upon the trial . . .
>
> If it is determined that there was an oral agreement made on or about September 13, 1963, by Louis Siegel for defendant and C. Lee Chipman for plaintiff, and if some of the terms of such agreement were reduced to writing and embodied in a memorandum, may extrinsic evidence relating to the discussions and negotiations of the parties be admitted to add to or vary the terms of such memorandum?"

There is absolutely nothing here to support defendant's italicized phrase. The pretrial order shows squarely that defendant was on notice, before trial, that plaintiff proposed to rely on an oral agreement.

(c) Defendant's Objections.

Defendant states that evidence of negotiations and discussion came in over defendant's objection. (Brief,

p. 29.) There is a single objection cited. This objection, at Tr. 23-24, was directed to evidence of preliminary negotiations in January and February of 1963 relating to a potential transaction involving a different borrower. Defendant never made any objection to the evidence on the negotiations and agreements in September, 1963, relating to the borrower involved in this case, and relating to the oral agreement in issue in this case. Defendant's statement that such evidence was admitted for a limited purpose is not true.

(d) Plaintiff's Hesitant Election.

Defendant states that "After plaintiff rested, the court asked counsel for plaintiff to make an election between the written contract and the oral contract and, after hesitating, counsel stated that he relied on the oral agreement." (Brief, p. 29.) Defendant argues that plaintiff then stated that the Statute of Frauds was inapplicable because of the written memorandum.

Here again, defendant's argument is predicated upon an alleged fact which on an examination of the record turns out not to exist. Far from there being any hesitation, the record shows that plaintiff's counsel repeatedly and emphatically stated that he was proceeding on the oral agreement. The reliance was articulated not only at the conclusion of plaintiff's case (Tr. 394) but in the opening statement (Tr. 12). There was no reference to reliance on any writing. Similarly, in its Memorandum of Contentions of Fact and Law submitted for the pretrial, plaintiff did not state that it was relying on any written agreement. (pp. 18-19.)

It is true that plaintiff, in the course of argument, suggested to the Court that there was a memorandum which would in any event take the oral agreement out of the Statute of Frauds. Plaintiff's position obviously was in the alternative.

(e) Post-Trial Memoranda.

Defendant states that the oral agreement was asserted by the plaintiff for the first time in its post-trial memoranda. Defendant says that defendant could not be held to have waived the statute by having failed to make an objection because of this tardy assertion of plaintiff's claim.

Of course, defendant's argument here is contradicted by its own prior admission that the contention was made at the pretrial and the trial and in argument before the Court. It is also contradicted by the fact that the Court recognized, during the trial, that the Statute might be applicable to plaintiff's claim.

Defendant cites four cases to support its argument that it could not be deemed to have waived the statute. The cases do not support its position. In *Gard v. Ramos,* (1913) 23 Cal.App. 303, 304, the defendant expressly pleaded the bar of the statute at the end of its case. In *San Francisco Brewing Corp. v. Bowman,* (1959) 52 Cal.2d 607, 618, the defendant requested that the jury be instructed on the statute of frauds. In neither case was the defense ignored completely as the defendant did here. In *E. K. Woods Lumber Co. v. Moore Mill & Lumber Co.* (9th Cir. 1938) 97 F.2d 402, the Court indicated that the statute of frauds defense was raised when there was a denial of the contract

in defendant's answer. The Court indicated that defense was not waived under such circumstances. This 30-year-old case is not a correct statement of California law. See *Pao Ch'en Lee v. Gregoriou* (1958) 50 Cal. 2d 502. *Ellis v. Klaff* (1956) 96 Cal. App.2d 471, cited by defendant and quoted at length, has no discernible relevance to the specific issue here involved.

It is thus apparent that defendant's argument that it could not have claimed the statute of frauds is false. It could have claimed the defense; it failed to do so. That failure is a waiver.

Defendant asserts in its brief that absent a memorandum the contract is "invalid" citing California Civil Code Sec. 1624. (Brief, p. 32.) That, of course, is the same error which the Trial Court made. It has been repeatedly held that Sec. 1624 means merely that a contract not executed in conformity with the statute of frauds is not void but merely voidable. *Payton v. Cly,* (1960) 184 Cal.App.2d 193; *Zimmerman v. Bank of America,* (1961) 191 Cal.App.2d 55. If the defense is not raised by a proper claim, then, like any other contract which may be disaffirmed but is not, the oral agreement is valid.

B. Even If There Were No Waiver, the Statute of Frauds Was Satisfied by Written Memoranda.

Plaintiff's position is that an oral contract was made and that any objection based on the statute was waived. But if there was no waiver then, in the alternative, plaintiff contends that the written memoran-

dum signed by defendant would be sufficient to satisfy the statute.

Defendant contends that the several memoranda cited by plaintiff do not amount to a contract. (Brief, p. 32.) Its contention, however, is based on its *ipse dixit* that Exhibit 22 is not referred to in the "loan agreement". Paragraph 2B of the "loan agreement" refers to an Assignment of Lease. Exhibit 22, which Mr. Breakstone examined and approved before writing the "loan agreement," is the only document which fits that description. Defendant would have us believe that Mr. Breakstone's reference is not to the document he saw, reviewed and had in his possession, but to another non-existent document.

C. The Trial Court Misapprehended Evidence Bearing On the Oral Agreement.

Plaintiff noted in its brief that the Court grossly misapprehended testimony of Mr. Chipman. The Court repeatedly stated that there had been *direct testimony* that Mr. Chipman did not believe he had made an oral agreement on September 13. Defendant replied that when the Court spoke of direct testimony it really was referring to a transcript of a telephone call. (Brief, p. 33.)

This is sophistry. The Court alluded to direct testimony at the trial, not to a telephone call transcript. (Tr. 418, 419, 432.)

Nor does the telephone conversation quoted by defendant support its contention. The full colloquy is as follows:

"Breakstone: Well, as I say, I'm not the Judge and the jury, but I'm cognizant of what's happened, as I sat in on all of the negotiations, with the exception of the very beginning, and what transpired in the beginning, and so forth. But, it boils down to the fact that he (Smith) just changed his mind . . .

Chipman: That's the simple way to put it, and that really—really describes it best of all.

* * * * *

Breakstone: That's what he did, and he did it based on getting a proper concept of the engineering, which he didn't get when he read Gene's report. Now, I will say this, Gene didn't make it as clear as Shafer did.

Chipman: But, Mr. Siegel made a—I don't like to say commitment—because, I'll use it—but I'm using it because I don't know of a better word to use at the moment. He did not make a true commitment, eh,—but, nevertheless, Mr. Siegel made a statement—a very positive statement—based on Fiedorek's work.

Breakstone: That's right.

* * * * *

Chipman: I could only presume that Mr. Siegel had benefit of Fiedorek's report when he said 'if Shafer matches or exceeds Fiedorek's work, you've got a loan . . .'

Breakstone: Those—(laughter) those were his exact words.

Chipman: That's right.

Breakstone: *So, he wanted a check, and that's all.*"

(Plaintiff's Exhibit 25, p. 2. Emphasis added.)

It is perfectly obvious that Mr. Chipman and Mr. Breakstone were simply saying that the commitment was conditional; it was conditioned on the engineering report.

Of course, it is true, as defendant argues, that the Court's statements during a trial are not equivalent to findings. Yet it is also true that a finding may be erroneous if it derives from a gross misapprehension of the facts.

We have in this case the very clear statement by the Court that it understood a certain set of facts to exist and that it understood certain testimony to have been given. The transcript proves that the facts the Court believed to exist did not exist and that the testimony on which the Court relied had never been given. Findings which grew from such tainted ground can hardly be palatable.

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2. THE TERMS LEFT FOR FUTURE NEGOTIATION WERE NOT ESSENTIAL TERMS.

The Trial Court stated, as a conclusion of law, that the written loan agreement was not binding because "essential terms" had been reserved for future negotiation. (R. 321.) Plaintiff argued that the term left for future negotiation was not "essential". Defendant's riposte is to berate plaintiff for not treating the Conclusion of Law as a Finding of Fact. (Brief, pp. 12-13.)

Defendant quoted two findings (Brief, p. 11) and implied that the Conclusion of Law could not be ques-

tioned until the two findings were first shown to be clearly erroneous. But the two findings have nothing to do with the Conclusion of Law. The quoted findings purport to list some of the terms of the so-called "offer" of September 12-13. They do not interpret the written loan agreement or the oral agreement.

The legal issue here is whether the term left for future negotiation was essential. Defendant's brief ultimately addresses itself to this issue. (pp. 19-27.) After reviewing the law, it concludes with the truism that the time and manner of payment of a loan are essential terms. (p. 27.) No one disputes such a statement. But that was not the term left for future negotiation in this case. As demonstrated in plaintiff's brief, the term left open related to the bank's allocation of the payment to be made. The Court clearly stated that its understanding of the law was that such an internal allocation was "essential". (Tr. 445.) Such an internal allocation is not the same as the terms for "the time and manner of payment of a loan." One relates to the accounting for the payments received; the other to the right to receive specific payments and to enforce that right. One is not essential because it does not affect the economics of the transaction. The other is essential because it determines precisely what the lender can compel the borrower to pay.

Defendant does attempt to argue that the excluded term was broader than an internal allocation. Defendant quotes testimony to show that on September 13 there was no agreement at all on the method of paying the "fee note". (Brief, p. 15.) Defendant studi-

ously avoids mentioning that the parties had agreed that the method for payment of the fee note would be selected by the Bank (Finding XI(f), R. 318) and that the Bank made its selection in Mr. Breakstone's letter of September 18. (Exhibit 11.)

Defendant also says that the disposition of the initial equipment lease payment was unsettled. (Brief, p. 14-15.) There is no finding on this point. Nor does defendant's statement comport with the facts. The Assignment of Lease (Exhibit 22), which defendant approved "as to form", expressly stated that plaintiff, as assignor, excepted from the assignment "the first installment of rental provided for in said Equipment Lease" (Exhibit 11, paragraph 1.1.A). That Assignment was included by reference in paragraph 2.B of the written loan agreement which defendant sent to plaintiff on September 18, 1963. Moreover, it is perfectly obvious that the schedule of payments mentioned in paragraph 8 of Exhibit 11 could not apply to such initial lease payment. The reason is that the schedule applied only to the application of the runs of oil from the producing properties. (Exhibit 11, paragraph 8, line 5.) The initial lease payment was not payable out of such runs. As stated in the Equipment Lease (Exhibit 4), it was an amount due on delivery and withheld from the sums to be advanced to Ancora. The difference is not trivial. As noted in plaintiff's opening brief, and not challenged by defendant, it was agreed that the Bank's loan was to be repaid only out of runs from producing properties (p. 27, Tr. 389-390) and thus the schedule of pay-

ments in the "loan agreement" could not involve the initial Lease payment.

Defendant's brief states that the schedule of minimum payments[1] would result in a deficit. (Brief, p. 16.) But defendant persistently ignores the realities of the agreement. The engineering reports showed that the expected runs were more than ample to pay the loan and the Assignment of runs showed that it was these *gross* runs which were to be assigned to the Bank. Defendant says there was no source of payment of the "deficiency" if only the minimum payments were retained by Bank. Why does it think there was to be a reserve accumulation out of runs of $75,000. (Exhibit 11, paragraph 8.)

Defendant says, in response to the demonstration that the schedule set forth only minimum payments, that "this construction of the instruments would undoubtedly shock the parties, particularly Ancora . . ." (Brief p. 17.) Defendant's "undoubtedly" is undoubtedly false. Ancora would not be shocked because the agreements it signed very clearly and explicitly said that all of the runs were assigned, not only to the extent of the minimum monthly payments, but to pay the indebtedness "In such manner as Mortgagee may elect . . . regardless of whether such payments exceed the payments of principal and interest provided to be paid in said indebtedness . . ." (Exhibit 4A, 11-12.) Defendant scoffs at this language. Its refutation is that the Ancora note contains no "on or before"

[1]Defendant, in a footnote on p. 16, complains that the schedule was not referred to at trial. See Tr. 396, lines 13-14.

clause. (Brief, p. 17.) But the note states that reference must be made to the mortgage to determine the extent of the security and the rights of the holders of the note. Would Bank seriously contend that the language quoted would not avail to give the Mortgagee the power to use the runs to make payments "regardless of whether such payments exceed the payments of principal and interest" otherwise provided to be paid? Does defendant contend the language means nothing?

Defendant contends finally that "defendant was not even party to the documentation upon which plaintiff's analysis is based. Only Ancora and plaintiff were party to Exhibits 4A, 4B, 4C and 4D." (Brief, p. 18.) Obviously, the Bank was not a party to the instruments executed by plaintiff and Ancora. The Bank was simply the assignee of plaintiff. (Exhibit 11, paragraph 2B, Exhibits 21, 22 and 23.) But as assignee, it could get no more than the payments which its assignor was to receive from Ancora. The whole point is that Bank's payments were to be made out of Ancora's runs, and Bank, therefore, could only receive the runs which Exhibits 4A-D conveyed to plaintiff. The "essential terms" for the time and manner of payment are set forth in those Exhibits.

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3. DEFENDANT COULD NOT WITHDRAW ITS AGREEMENT.

Defendant does not meet a main thrust of plaintiff's argument that the Court erred in concluding that there was an offer which could be withdrawn.

The Court held that there was an offer which included, as one of its terms, that the agreement be reduced to writing. (Finding XI(a).) The finding did not require that the writing be signed or delivered. As noted in plaintiff's brief, defendant initially agreed that the writing need not be signed by plaintiff. (Opening Brief, p. 29.) Defendant has contended, and contends again in its brief, that *mutual execution* of the writing is an indispensable condition to any contract. Why?

The cases cited by defendant are inapposite because in those cases it was found that the parties contemplated that both would sign. The testimony quoted in defendant's brief does not show any such understanding and defendant earlier so conceded. (R. 244.) The Court's legal conclusion that the "offer" could be withdrawn before the writing was signed by plaintiff is therefore insupportable. Plaintiff's signature was simply not necessary.

Defendant also fails to meet the second point of plaintiff's argument. Defendant concedes that "the Court made no finding as to whether or not there was an oral agreement. . . ." (Brief, p. 37.) But defendant argues that it could not have found an oral agreement since it did find that there was an oral offer which required a writing. (Brief, p. 37-38.) The illogic is apparent. An offer on certain terms does not prohibit the making of an agreement on other terms. In any event, the Court failed to rule on a central issue and defendant cannot cure that failure by speculating about what the Court would have done if it had gotten around to the point.

4. DEFENDANT, IN CONTENDING THAT ITS REFUSAL TO MAKE THE LOAN WAS NOT ABSOLUTE, OR WAS LATER WITHDRAWN, IS IMPEACHING ITS OWN FINDINGS OF FACT.

The Court did not expressly find that the conditions precedent to the loan were, or were not, excused. The Court did find, however, that at all times since September 20, 1963, defendant has refused to make the loan. (R. 319.) Defendant busily cites evidence to the effect that defendant's refusal was not unequivocal, or that it cured its repudiation by subsequent expressions of willingness to perform. (Brief, p. 39.) It is interesting to see the appellee attack its own findings. It should be noted that the evidence cited by defendant relates to conversations *after* September 20, 1963. (Tr. 306-307.) The finding rejected such evidence because it expressly stated that defendant, *"at all times since September 20, 1963"* has refused to make the loan.

Plaintiff's argument was that the Court's Finding of Fact XVI was legally inconsistent with Finding of Fact XVII. Having determined that defendant refused to make a loan after September 20, 1963, the Court could not rule that plaintiff lost any rights by failing to perform any conditions after September 20. Defendant does not meet this argument. Instead, defendant now ingenuously contends that had the conditions been performed, it would have made the loan! (Brief, p. 39.) This should be remembered in considering defendant's earlier plaints that the contract was too uncertain to perform.

5. CONCLUSION.

The Court erred when it failed to rule on whether the parties had entered into an oral agreement.

The Court erred also when it determined, as a matter of law, that a written agreement was unenforceable because "essential" terms were omitted or because it could be withdrawn before it was signed by plaintiff.

Dated, San Francisco, California,
September 24, 1968.

Respectfully submitted,
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